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No. 93-1550

In The

Supreme Court of the United States

October Term, 1993

MICHELLE CORWIN, Registrar of Voters for the CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioners,

vs.

DENNIS MARK, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CALIFORNIA SECRETARY OF STATE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS

The Secretary of State of the state of California is the chief elections officer of the state. Cal. Gov't Code §12172.5, Cal. Elec. Code §55. The office of Secretary of State is itself an elected office. Cal. Const., art V, §11. The Secretary of State is responsible for overseeing the conduct of elections in California, including elections for local, school and judicial office. Cal. Gov't Code §12172.5,

Cal. Elec. Code §55. In California, these offices are nonpartisan offices. See Cal. Const., art. II, §6(a); Cal. Elec. Code §37.

As part of his duties in ensuring that state election laws are properly enforced, see Cal. Gov't Code §12172.5, the California Secretary of State regularly interprets and provides advice to local government officials in California concerning the proper application of the California Elections Code. Among the statutes about which the Secretary of State provides advice is Cal. Elec. Code §10012, the statute at issue in this case. Cal. Elec. Code §10012 provides the sole statutory authorization for publishing in Voter's Information Pamphlets a 200-word statement of qualifications ("candidate's statements") by candidates for nonpartisan office in California. Candidate's statements are important informational/educational tools for California's voters, particularly because the statements are sent to all registered voters. See Cal. Elec. Code §10012(b).

Following the September 1, 1993 decision by the United States Court of Appeals for the Ninth Circuit in this case, the Secretary of State wrote a letter to the court in support of the City and County of San Francisco's Petition for Rehearing Before The En Banc Court, Or Alternatively, For Modification of Order. See Petition For Certiorari, p. 11, n.11. In that letter, the Secretary of State expressed concern about the uncertainty created by the Ninth Circuit's summary order. This brief of amicus curiae is submitted in furtherance of that concern.

Pursuant to Supreme Court Rule 37.2, the Secretary of State has obtained the consent of all parties in this action to the filing of this brief in support of petitioner.

ARGUMENT

IT APPEARS THAT THERE IS INCONSISTENCY IN THE DECISION BELOW WITH PRIOR DECISIONS OF THIS COURT, AND IN LIGHT OF THE SUMMARY NATURE OF THE DECISION BELOW, THIS CASE MAY BE PARTICULARLY SUITABLE FOR SUMMARY REVERSAL.

In this case, the United States Court of Appeals for the Ninth Circuit has declared unconstitutional an important election law of the State of California, Cal. Elec. Code §10012. Unfortunately, the court below has done so in a case in which that court should never have even reached the issue of the statute's constitutionality. See Petition For Certiorari, pp. 12-18, 21-22, 24. Moreover, even if, as the court's summary order states, San Francisco conceded the unconstitutionality of the statute, see *Geary v. Renne*, 2 F.3d 989, 990 (9th Cir. 1993) (en banc), the court should not have declared the statute void for all of California based upon the concession of one political subdivision of the state. The harm to all the people of California from this excessive judicial action is significant. As the chief elections officer of California, the Secretary of State strongly urges that certiorari be granted.

In urging the need for certiorari, the Secretary of State further urges that this case appears to be appropriate for summary reversal. We recognize that summary disposition is rarely invoked. For the reasons that follow,

however, this case seems to be one in which such treatment may be warranted.

First, it appears that "the decision of the Court of Appeals is inconsistent with this Court's precedents." *National Labor Relations Board v. Int'l Assn. of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 721 (1984) (per curiam). As fully described in the Petition for Certiorari, the Ninth Circuit has not followed this Court's consistent instructions "never to anticipate a question of constitutional law in advance of the necessity of deciding it; [and] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Here, the Ninth Circuit held Cal. Elec. Code §10012 unconstitutional, even though (1) the complainants' standing was in doubt and (2) the defendants candidly acknowledged that the statute was misapplied. See Petition for Certiorari, pp. 12-18, 21-22, 24. This unnecessary anticipation of a constitutional question which presents the kind of case for which summary disposition is reserved: A "situation[ ] in which the law is settled and stable, the facts are not in dispute, and the decision below [to reach the issue of the statute's validity] is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall J., diss.)

Second, summary reversal is appropriate because the Court of Appeal's decision itself is summary. Thus, the Court would not be vacating any "carefully reasoned decision" that provides any guidance to the district courts in this or other litigation. See *Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 947 (1977) (Stevens, J., diss.)

Third, summary reversal would eliminate a confusing decision on a question of importance. The Ninth Circuit's two-sentence paragraph invalidating Cal. Elec. Code §10012 is subject to various interpretations. See Petition For Certiorari, pp. 11, n.11 and 28. As a result, California's chief elections official is uncertain about the proper application of this important statute, or whether it may be used at all. Thus, to grant certiorari and vacate the decision summarily would not have the Court "spend[ing] its time correcting harmless errors." *Alabama v. Pugh*, 438 U.S. 781, 782-783 (1978) (Stevens, J., diss.)

Fourth, eliminating this confusing order would serve the interest of justice, 28 U.S.C. §2106, without causing harm to the complainants in this case. Petitioners have represented to the court below that "[t]he City accepts that §10012 is properly enforced only through judicial proceedings." See Petition for Certiorari, p. 24 and App. H. p. H-12. The California Secretary of State joins in that view. This Court has previously rejected overbreadth challenges to local laws on the basis of representations by local officials that they interpret the laws narrowly and apply them according to constitutional standards. See *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). Given San Francisco's agreement to enforce §10012 judicially, the complainants here have obtained the relief they sought even if the Ninth Circuit's Order is vacated.

Finally, nonpartisan elections will occur throughout California in June and November 1994. Thus, should the Court grant certiorari and agree that the decision below conflicts with the decisions of this Court, only a summary

disposition would remove the uncertainty over Cal. Elec. Code §10012 in time for the next elections.

CONCLUSION

The people of California have been harmed by the uncertainty created by the lower court's invalidation of an important election law in a case where the law's validity should never have been decided. The interests of justice and of comity would be served by a grant of certiorari. In particular, this appears to be the rare case in which summary reversal of the Court of Appeal's judgment may be warranted.

DATED: April 14, 1994

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